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need must be supported by something better than this presumption of guilt by past political association.[116]

But even if it were conceded, arguendo, that the Committee in 1954 actually required identification of those who were Communist Party members between 1942 and 1947, still there was no legislative need for the identifications demanded from petitioner. The conclusive answer to the contention that the Committee had a need for the identification of *these individuals*, is that they all had already been identified before this very Committee, in some cases by more than one witness.[117] No cogent reason can be suggested why the Committee required public re-identification of persons who had already been identified before it, in some cases repeatedly, as former members of the Communist Party.[118] Indeed, the very implausibility of any "need" for such re-identification lends support to our earlier contention that the only realistic explanation of the Committee's actions is in terms of the exercise of its asserted function of exposure.

Congressman Francis E. Walter, the present Chairman

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[116] *Cf. De Jonge* v. *Oregon*, 299 U.S. 353; *Herndon* v. *Lowry*, 301 U.S. 242; *Schneiderman* v. *United States*, 320 U.S. 118.

[117] This Court recently indicated that it will not be receptive to an assertion of governmental need for information where the information has already been obtained. In *Slochower* v. *Board of Education*, 350 U.S. 551, 558, the Court said:

> ". . . the present case differs materially from *Garner*, where the city was attempting to elicit information necessary to determine the qualifications of its employees. Here, the Board had possessed the pertinent information for 12 years, and the questions which Professor Slochower refused to answer were admittedly asked for a purpose wholly unrelated to his college function. On such a record the Board cannot claim that its action was part of a bona fide attempt to gain needed and relevant information."

[118] As was pointed out by the dissenting judges below, any legislative need for the information demanded from petitioner "might have been served by questioning Watkins in a closed session. But the Committee questioned him at a public hearing" (R. 193).

of the Committee, has himself fully answered the argument of congressional need which the Government now asserts on behalf of his Committee. During the Committee's 1951 Hollywood hearings when a witness, Larry Parks, was unwilling to re-identify former members of the Communist Party, Congressman Walter stated:

> "*How can it be material to the purpose of this inquiry to have the names of people when we already know them?* Aren't we actually, by insisting that this man testify as to names, overlooking the fact that we want to know what the organization did, what it hoped to accomplish, how it actually had or attempted to influence the thinking of the American people through the arts?" (Emphasis supplied.) *Communist Infiltration of Hollywood Motion-Picture Industry*—Part I (82d Cong., 1st Sess.), p. 93.

In sum, it cannot be that mere membership in a political party subsequently found to be dominated by persons with subversive and illegal motivations, subjects members, years after they have discontinued membership, to repeated public identification before the same congressional committee. Nor is there justification for compelling former associates to become the agents of such repeated re-identifications. If the original identification of these thirty persons added anything necessary to the Committee's information about the character or nature of the Communist Party, at the very least the informational need was met once these specific individuals had been identified before the Committee. A contrary rule would serve as justification of a legislative trial and preclude any meaningful accommodation of the congressional power of inquiry to the guarantees of the First Amendment.

D. *The Decision of the Court Below*

Where exercise of the congressional power of inquiry infringes upon First Amendment freedoms, courts must undertake an accommodation and harmonizing of these conflicting principles. The degree of infringement on individual freedom, on the one hand, must be measured against the immediacy or urgency of the informational need on the other. It is precisely this weighing and balancing of the interests of the individual and of the state that the court below refused to undertake.

Nowhere in the opinion below is there any discussion of the abridgment of First Amendment rights set out above. The court summarily disposes of First Amendment issues (R. 182) not only without any weighing of conflicting principles, but without even finding that the Committee had a need, either remote or urgent, for the information it sought from petitioner.[119]

Certainly the statement of the court below that "the questions asked Watkins could be asked for a valid legislative purpose" (R. 178) does not constitute a determination by the court of a legislative need for answers to the questions. A possibility of a legislative purpose is not the equivalent of a legislative purpose (see pp. 70-76, *supra*); and a legislative purpose is not the equivalent of legislative need. What we have, therefore, is a statement two steps removed from the urgent need required to justify far-reaching infringements of First Amendment rights.

Certainly, too, the court's statement that the purpose of the Committee's hearing was related to an amendment to the Internal Security Act (R. 181), cannot be deemed the equivalent of a determination of need. We have already shown that the questions petitioner refused to

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[119]A persuasive disposition of the question of legislative need appears in the dissenting opinion (R. 191-193).

answer actually had no relationship to this amendment (pp. 70-76, *supra*). The statement of the court below can thus be explained only on the assumption that the court was again referring to the hypothetical possibility of a legislative purpose. Again, as indicated in the previous paragraph, such a possibility of a legislative purpose is not the equivalent of a determination of legislative need.

Probably the main reliance of the court below was upon its statement "that, having power to inquire into the subject of communism and the Communist Party, Congress has the authority [120] to identify individuals who believe in communism and those who belong to the Party, since the nature and scope of the program and activities of the Communist Party depend in large measure on the character and number of its adherents . . . Personnel is part of the subject" [121] (R. 182). But, whatever justification the theory that "personnel is part of the subject" might have provided for the identification of Communists in strategic

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[120] The court below appears to have confused congressional "authority" with congressional need (R. 182). We have demonstrated earlier in this brief (Points I-III) that no such authority exists. But, even if the authority did exist, it would not in and of itself justify the infringement of First Amendment rights. It takes urgent "need", rather than legal "authority", to support such infringements.

[121] It has been pointed out how limitless is the incursion on the privacy of ordinary citizens which might be justified on this theory. See Taylor, *Grand Inquest*, pp. 164-165. Indeed, in the instant case the Committee sought to identify persons who were merely past members of the Communist Party—ordinary citizens who were not even members of a labor union. See n. 69, *supra*. The extreines to which identification can be carried for purposes of harassment are well illustrated by current efforts in some of the states to force a disclosure of the names of all members of the National Association for the Advancement of Colored People within their borders. The First Amendment issue raised by this attempted wholesale disclosure of NAACP membership is now being litigated in a number of southern states. See, e.g., *National Association for the Advancement of Colored People* v. *State of Alabama, on the relation of John Patterson, Attorney General*, now pending in the Supreme Court of Alabama.

positions when Congress first initiated investigations into Communist activities, it cannot now support continued identification of those who were Party members long ago. Moreover, it certainly provides no justification for *re-identifications* which can shed no light upon either the former or the present "nature and scope of the program and activities" of the Communist Party. No pervasive need justifying abridgment of First Amendment rights arises from the generalization that "personnel is part of the subject."

In sum, neither the hypothetical relevance of the Committee's questions nor the generalization that personnel is part of the subject can supply an actual need for the identification and re-identification of one-time Communists or "support an exercise of the investigative power that puts every man's past record of association and opinion to the test of either public or secret inquisition under oath."[122]

We do not challenge the contention that the substantiality of congressional need for information may, on occasion, justify the compulsion of disclosures which normally would be protected under the First Amendment. But we do say that unjustifiable abridgment of liberties of association and expression, forbidden to Congress by the First Amendment, may no more be achieved by the legislature's power of inquiry than by its power to legislate. Where the infringement on basic liberties is as patent and far-reaching as it is in the instant case, and the congressional need is as remote and fanciful as the need presently asserted, constitutionally-guaranteed freedoms must prevail. In the *Rumely* case this Court reiterated, in the context of the congressional

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[122] Taylor, *Grand Inquest*, p. 167.

power of inquiry, Justice Holmes' admonition that all rights

> "are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."

In petitioner's case, under even the most liberal view of Congressional authority to obtain legislative information, the point has been reached where First Amendment principles "become strong enough to hold their own."

V

2 U.S.C. 192, Read Together With the Authorization of the Committee on Un-American Activities, Is So Vague and Indefinite as to Deprive Petitioner of Due Process of Law

Section 192, under which petitioner was indicted and convicted, punishes refusals to answer questions "pertinent to the question under inquiry" by a Committee of either House of Congress where the question under inquiry is within the power of the Committee to investigate.

There is no independent authority, comparable to a judge when questions are asked by a grand jury, to which a witness can appeal to make the determination whether the announced "question under inquiry" is within the authority of the committee before which he is testifying. The witness in any congressional inquiry must resolve for himself whether a question by the committee is part of an *authorized inquiry* and this he can only do by reference to the statute or resolution purporting to authorize the investigation. Therefore, the contempt statute must be read together with the enactment setting forth the authorization of the particular committee, in order to decide whether the

witness was able to make the determination that the inquiry was authorized with the accuracy required by the due process clause.

This process of combined construction has been used in determining whether a statute was unconstitutionally vague (see e.g., *Kraus & Bros.* v. *United States*, 327 U.S. 614, 620), and is, indeed, the only method of determining the constitutional question here presented. In the *Rumely* case, for example, this Court would not have been able to reach the conclusion that Section 192 was, or might be, unconstitutional, as to Rumely without reading it together with the authorizing resolution involved in that case.

By this combined construction, the criminal provision which must be considered for the application of the void for vagueness doctrine would read in substance about as follows:

> It shall be a crime punishable by a fine of not more than $1,000 and imprisonment for not more than one year for any witness before the Committee on Un-American Activities of the House of Representatives to refuse to answer any question pertinent to any question under inquiry about which the Committee was authorized to inquire under its statutory authority to investigate the extent, character and objects of un-American propaganda activities in the United States, the diffusion within the United States of subversive and un-American propaganda attacking the principle of the form of government as guaranteed by our Constitution, and related questions.

On its face this composite statute provides no reasonably ascertainable standard of guilt and is too vague and indefinite to meet the standards of due process under the Fifth Amendment. *United States* v. *Cohen Grocery Co.*,

255 U.S. 81; *Connally* v. *General Const. Co.*, 269 U.S. 385; *Herndon* v. *Lowry*, 301 U.S. 242. The double basis for the requirement of adequate certainty is the individual's need for notice as to the standards of conduct which he must follow, and the prosecutor's need for an adequate guide in enforcing the law. Neither basis is satisfied here. Under the composite statute quoted above, "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453.

Although it is beyond dispute that the Committee has expanded its investigations far beyond the literal reading of its authorization, it is far from clear what the present limits of the authorization are actually supposed to be and what the courts may fairly construe them to be in determining whether or not there has been contempt of the Committee in failing to respond to questions not within the literal mandate of the Committee. See n. 123, p. 122, *infra*. The emphasis, in practice, has shifted away from propaganda; the phrase rarely appears in any but a formal manner. Instead the Committee tends to describe its area of investigation as "subversive and un-American activities" (R. 125, *Annual Report for 1951*, p. 5). Congressman Doyle, a member of the Committee, spoke of exposing "subversive activities" in reporting to the Congress during the debate on the 1954 appropriation for the Committee (R. 168, 100 Cong. Rec. 2174, daily issue). The Chairman, opening the Chicago hearings of which petitioner's questioning was a part, used the phrase "extent and success of subversive activities directed against these United States . . ." (R. 43.) We submit that a witness deciding whether he may rightfully refuse to answer a particular question cannot possibly determine from such statements the present limits of the Committee's authority with anything like the degree of certainty required for a criminal statute.

The Committee asserts the authority to investigate "subversive" and "un-American" activities.[123] Probably no two words in common usage today have as varying meanings to different people. The Committee, in an obvious effort to cure this vagueness, recently defined "un-American or subversive activity" as follows: "That activity which attacks the principle of the form of government as guaranteed by our Constitution is un-American and subversive by seeking to overthrow it by use of force and violence, in violation of established law."[124] Yet the Committee has never applied and does not now apply this standard in its operations. Indeed, under the heading "Subversive Activities" in the very public relations pamphlet containing the above definition, the Committee went far beyond the overthrow of the government by force and violence and went into "Communist fronts" (p. 21); Fascists or "hate" groups (p. 21); "fellow-travelers" (p. 24); teachers who claim the Fifth Amendment (p. 23); etc.

The Committee's investigations themselves indicate that it treats its authority and the phrase "subversive activities" to mean whatever comes under the personal interdiction of its members in the way of unorthodox opinions and activities. Listing only a few of the Committee's hearings and reports, investigations have included as their focal objects the Office of Price Administration (1945), the

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[123] Of course, for the Court to reach this point, it must have construed the Committee's authorization as going far beyond propaganda activities (see pp. 76-96 *supra*). Any such interpretation would have had to be based on a Congressional ratification of the Committee's broad assertions of power. We assume, therefore, for purposes of this part of the brief, that the Court has accepted the Committee's assertions of power as ratified by the Congress and incorporated in its authorization. This very holding of ratification aggravates the uncertainty posed for one such as petitioner. He cannot rely on statutory language but must examine complex issues of implicit, rather than explicit, ratification to determine what constitutes contempt of this Committee.

[124] This is YOUR House Committee on Un-American Activities, p. 2.

CIO Political Action Committee (1944), labor unions (1947, 1949, 1950, 1953, the movie industry (1947, 1951, 1952), Oliver Edmund Clubb, an employee of the State Department (1951), Dr. E. U. Condon (1952), Bishop Oxnam (1953), The Methodist Federation for Social Action (1952), the theatre (1955), the Fund for the Republic (1956).

The scope of the statute is in no way narrowed, nor is its vagueness in any way cured, by the announced purpose of the particular hearing at which petitioner testified. On April 29, 1954, the date on which petitioner appeared, the Chairman simply announced that "the hearing this morning is a continuation of the hearings which were held in Chicago recently" and counsel started to ask petitioner questions (R. 70). Nor does the announced purpose in Chicago afford any enlightenment even if it had been read to petitioner (R. 43-44). The Chairman referred to "subversive activities" and to the fact that Chicago is not necessarily better or worse than other cities, and stated that "subversive infiltration" was under consideration (R. 44). Petitioner could have found no guidance in this statement in making his determination whether the subject under inquiry was within the broad interpretation of the Committee's authority. When petitioner questioned "the proper scope of . . . [the] committee's activities," (R. 85), no clarification was forthcoming but only a direction to answer (R. 86). Neither the statute nor its interpretation by the Committee was sufficiently definite to enable the petitioner to determine the scope of the Committee's authority.

Petitioner had to decide for himself if the Committee had authority to require him to state publicly whether 29 individuals had been members of the Communist Party 10 years earlier; he had to decide whether the fact of one-time membership of persons who had "long since removed themselves from the Communist movement" (R. 85) was

within the scope of an investigation of "un-American" and "subversive" activities. Petitioner might reasonably have believed that past membership was not an un-American activity both because it had been engaged in by many Americans and because it had been perfectly legal at the time in question. Likewise, petitioner might reasonably have believed that past membership was not subversive both because of its then clear legality and his own failure to observe any disloyalty on the part of these individuals. No questions were asked petitioner about any unlawful or disloyal conduct by him or any of the 29 persons and he may very well have believed that, in the absence of some unlawful or disloyal conduct, the fact of membership in the years 1942 to 1947, before the Cold War, was not within the terms "un-American" or "subversive". Apparently petitioner believed that present membership might well be deemed un-American or subversive as he not only agreed to, but did, name present members. The distinction petitioner apparently drew between present and long past membership can hardly be deemed an unreasonable one. Only by asserting the proposition that any connection with the Communist Party, no matter how long ago and without reference to any illegal or disloyal activities, is un-American and subversive, can one say that these terms have sufficiently clear meaning so that petitioner could have told with reasonable certainty whether he had to answer the questions put to him by the Committee.[125]

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[125] Limiting the applicability and effective use of Section 192 because of its vagueness and indefiniteness in the case of the Committee on Un-American Activities will not deprive Congress of the power to compel pertinent testimony. Congress can, as it has on occasion, authorize its committees to compel pertinent testimony by applying for a court order, which would permit a judicial determination of the pertinence of the testimony sought before the witness is subject to contempt proceedings. This is the standard procedure provided for investigations conducted by administrative agencies (see Taylor, *Grand Inquest* (1955), pp. 260-262)

VI

Petitioner Has Been Deprived of His Right to a Fair and Impartial Grand Jury

We turn now to the grand jury question raised, but left undecided, in *Quinn* v. *United States*, 349 U. S. 155, 170; *Emspak* v. *United States*, 349 U. S. 190, 202; and *Bart* v. *United States*, 349 U. S. 219, 223. As in those cases, the Court here will no doubt desire to consider first whether petitioner's refusal to "inform" on former associates, in the circumstances of this case, constituted a violation of the contempt statute and will only reach this grand jury point if it should reject all of petitioner's previous arguments (Points I-V).

In the trial court, petitioner moved for a dismissal of the indictment on the ground that, by virtue of the fear instilled by the government employees security programs, less than 12 grand jurors were free from bias against him and able to cast their votes impartially, or for a preliminary hearing at which he could prove the essential facts supporting the motion. Petitioner, by an affidavit of counsel attached to his motion for dismissal or preliminary hearing (R. 5, 9-10), made an affirmative showing that the personal bias and fear, which this Court had found wanting in *Dennis* v. *United States*, 339 U. S. 162, actually existed on the part of the grand jurors in this case (R. 10).

The affidavit of counsel attached to petitioner's motion related that "more than 11 members of the grand jury which voted this indictment are biased and prejudiced against the

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and would remove the unfairness in a witness having to make a decision on pertinence at his peril. Certainly, in the absence of some such procedure for court orders, Congress should be required to provide authorizing resolutions sufficiently definite so that a witness can know with reasonable certainty whether the questions put to him are within the committee's authorization.

defendant and unable to exercise an independent judgment, by reason of the fact that they, or close associates, including relatives, were employed by or were seeking employment with the United States or the District of Columbia Government" (R. 5); that 11 of the 23 members of the grand jury, including the foreman and deputy foreman, were employed by the Government of the United States (R. 5); that 2 others were employed by the District of Columbia Government (R. 5); that still others had close associates and relatives who were employed by the United States or the District of Columbia (R. 5); that still others sought employment there (R. 5); and that 7 years of successive loyalty and security programs had instilled in United States and District of Columbia employees and their close associates and relatives a fear of creating the appearance of sympathetic association with left-wing or Communist causes so strong as to prevent them from casting their votes impartially and amounting "to an actual bias against any person accused of some act which might impede the hunt for supposed Communists" (R. 8). Moreover, the affidavit states that, at hearings under the security programs, persons under investigation were asked their opinions of the *Hiss, Remington, Coplon and Rosenberg* cases and their attitude towards the House Committee on Un-American Activities (R. 9). "If," the affidavit continues, "the mere opinions of persons who have not even participated in a case thought to affect the security of the government are treated by the authorities as relevant to a decision on security or loyalty status, the grand jurors would recognize that a vote against an indictment in this case would be harmful to their security status" (R. 9).

The Government filed no answering affidavit challenging any of these facts. The District Court, however, denied petitioner's motion without opinion (R. 10-11). The Court

of Appeals, although this question had been placed squarely before the court by petitioner (Brief for Appellant, pp. 72-74), omitted any reference to the grand jury question in its decision. The minority had no occasion to refer to this point, since they voted for reversal of the conviction on other grounds.[126]

The refusal of the courts below to dismiss the indictment or grant a preliminary hearing on the ground of grand jury bias and prejudice created by the government employees security programs deprived petitioner of his right to a fair and impartial grand jury (*Cassell* v. *Texas*, 339 U. S. 282), acting as a "responsible tribunal." *Beavers* v. *Henkel*, 194 U. S. 73, 84. "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Dennis* v. *United States*, 339 U. S. 162, 171-172; *Morford* v. *United States*, 339 U. S. 258, 259. Whether a defendant's right to a fair and impartial grand jury be based on the Constitution or upon the statute requiring grand jury action for the misdemeanor involved in contempt (see 2 U.S.C. § 194), or because the Government chose that method of proceeding, the right to a fair and impartial grand jury is undeniable. As the Government has stated elsewhere, while "the Fifth Amendment requires indictments only in capital 'or other infamous' crime, . . . where the Government has chosen or been compelled to proceed by indictment, the accused probably has standing to move to dismiss an indictment found by a disqualified body, just as he would have a right to attack an information filed upon the oath of a disqualified prosecuting officer." [127]

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[126] The position of the minority judges favoring reversal on the grand jury point under similar circumstances is set forth in their dissenting opinion in *Quinn* v. *United States*, 203 F. 2d 20, 26.

[127] The Government's statement was made in the court below in *Emspak* v. *United States*, 203 F. 2d 56 and is quoted in *Quinn* v. *United States*, 203 F. 2d 20, 26, n. 2.

(i) In the District Court, the Government, filing no answering affidavit and thus admitting the facts alleged in petitioner's affidavit for purposes of the motion to dismiss, relied upon this Court's decision in *Dennis* v. *United States*, 339 U. S. 162. But the Government's reliance on *Dennis* was misplaced. There Mr. Justice Minton, writing for the majority, stated that "no question of actual bias is before us. The way is open in every case to raise a contention of bias from the realm of speculation to the realm of fact" (p. 168). Clearly petitioner's motion and unanswered affidavit raise the question of bias "to the realm of fact." Mr. Justice Minton went on to state that "as far as it appears, the [trial] court was willing to consider any evidence which would indicate that investigatory agencies of the Government had recognized in the past or would take cognizance in the future of a vote of acquittal, but no such proof was made" (p. 168). Exactly such proof was supplied in the affidavit attached to petitioner's motion for dismissal—namely, that investigatory agencies of the Government would take cognizance of a vote against the Government since they had even taken cognizance of *opinions* concerning cases in which the Government was involved. Furthermore, the majority pointed out in *Dennis* that the loyalty program was then only three months old and "apparently not the subject of anticipatory fear by these jurors" (p. 170). Here, however, as the affidavit filed with petitioner's motion stated, "more than seven years of administrative implementation [of the loyalty and security programs] has created a real and personal fear" (R. 10).

(ii) In the Court of Appeals the Government suggested that the grand jury bias was not prejudicial because the essence of petitioner's defense at the trial was a "legal justification" rather than a factual denial (Brief of Appel-

lee, p. 18), thus making indictment certain. But this argument disregards the rule that where grand jury selection is likely to result in unfairness, "*reversible error does not depend on a showing of prejudice in an individual case*" because

> "The injury is not limited to this defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard* v. *United States,* 329 U.S. 187, 195.

Where the method of selecting grand and petit jurors presents the possibility of bias, this Court has from the first declined to look to the actual effect of the discrimination in the particular case, as long as the defendant was in the class likely to be injured. *Strauder* v. *West Virginia,* 100 U.S. 303; *Ballard* v. *United States, supra; Cassell* v. *Texas, supra; Thiel* v. *Southern Pacific Co.,* 328 U.S. 217.

It is no answer to state that a fair grand jury would also have indicted. *Cf. Tumey* v. *Ohio,* 273 U.S. 510, 535. Procedural due process assures that even a correct result may not be achieved by odious means. As was stated recently in a related context: "The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts." *Communist Party* v. *Control Board,* 351 U.S. 115, 124. Unless the guarantee of an unbiased grand jury is now to be limited to persons likely to have avoided indictment before a fair grand jury, the Government's argument merits no consideration.

(iii) In this Court, in its Brief in Opposition to the Petition, the Government, by cross-reference to its Brief in Opposition in *Ben Gold* v. *United States,* No. 137, October

Term, 1956, pp. 39-40, presented what appears to be an additional argument as follows:

> "The absence from normal grand jury processes of the *voir dire* examination, the historic guarantee against bias and partiality on the part of members of the petit jury, indicates the fundamental difference between the two kinds of jury. It attests the conviction, resting on centuries of Anglo-American experience, that the interest in expeditious administration of criminal justice is best served, without any sacrifice of society's equally fundamental interest in assuring fair trials to all accused persons, if the historic procedure for guaranteeing jurors free from bias and partiality is restricted to the selection of those who actually try the accused. This accommodation of interests is in keeping with the traditional concept of the grand jury as a shield between prosecutor and persons accused of crime, free, however, of various guarantees historically associated with the trial itself. Cf. *Costello* v. *United States*, 350 U. S. 359."

It is not entirely clear whether the Government is now contending that petitioner is not entitled to a *voir dire* examination of the grand jurors in order to prove bias, or that petitioner is not entitled to a grand jury in which at least 12 grand jurors concurring in the indictment are free from bias and prejudice against him.

If the Government's argument is limited to the suggestion that petitioner is not entitled to a *voir dire* examination of the grand jurors, it has no application here. Petitioner seeks no such examination. Petitioner, by his counsel's affidavit (R. 5-10), set forth a *prima facie* case of bias and prejudice of a majority of the grand jurors. The Government, relying upon the *Dennis* case, failed to file an

answering affidavit. Thus the facts set forth in the affidavit for petitioner must be taken as true. No one in this case is contending for a *voir dire* examination of the grand jurors. Petitioner moved for a dismissal of the indictment on the ground that there were less than 12 members of the grand jury concurring in the indictment who were free from prejudice or bias against him "by reason of the facts stated in the affidavit" and, in the alternative, if these facts should be challenged, requested a hearing to give further proof in support of the affidavit (R. 4). This is a far cry from a request for a *voir dire* examination of the grand jurors.

If the Government is suggesting the broader proposition that petitioner had no right to a grand jury containing at least 12 jurors free of bias and prejudice against him—and we are loath to assume that the Government is suggesting this point—then it would indeed be making a mockery of the grand jury process. Petitioner's motion and affidavit do not present a mere technical defect in the grand jury process;[128] they present a case of a grand jury rendered irresponsible by bias and prejudice against the defendant. Certainly the wrong done petitioner and the processes of justice is far more serious than that done in the exclusion cases; in those cases there was a mere possibility of bias whereas here the unanswered affidavit of petitioner sets forth facts indicating an actually biased and prejudiced grand jury. Exclusion from the grand jury of persons possibly biased in favor of an accused is far less prejudicial than the inclusion thereon of those actually biased against him. We submit that the fact that the grand jury process

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[128] Of course, even some technical defects invalidate grand jury action. It is interesting to note, for example, that under the Federal Rules of Criminal Procedure, petitioner is entitled to 12 legally qualified grand jurors concurring in the indictment. Rule 6(b)(2). It could hardly be contended that he is not entitled to 12 grand jurors free from bias and prejudice.

is not surrounded by all the "guaranties historically associated with the trial itself" does not mean that it is surrounded by none.

Conclusion

It is respectfully submitted that the decision of the court below should be reversed.

Respectfully submitted,

JOSEPH L. RAUH, JR.,
1631 K Street, N. W.,
Washington 6, D. C.,
HAROLD A. CRANEFIELD,
8000 East Jefferson Avenue,
Detroit 14, Michigan,
Attorneys for Petitioner.

Of Counsel:
NORMA ZARKY,
JOHN SILARD,
DANIEL H. POLLITT,
SIDNEY S. SACHS.